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No. 10-771

Supreme Court, U.S.
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In The

Supreme Court of the United States

NILSON HERNEY VALENCIA-RIASCOS,

Petitioner,

vs.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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March 22, 2011

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SUMMARY OF REPLY

The Government's brief in opposition to certiorari should not sway this Court.

First, the Government argues unconvincingly that the plain meaning of 8 U.S.C. § 1252(d)(1) mandates issue exhaustion, even though 8 U.S.C. § 1252(d)(1) does not explicitly refer to issue exhaustion. The Government attempts also to locate a jurisdictional issue exhaustion requirement within 8 C.F.R. § 1003.3(b) (or within some interplay between 8 U.S.C. § 1252(d)(1) and of 8 C.F.R. § 1003.3(b)), even though the federal immigration regulations do not limit federal court jurisdiction. *Accord Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827, 839-840 (2010).

Second, the Government implies there is no circuit split on whether 8 U.S.C. § 1252(d)(1) imparts a jurisdictional issue exhaustion requirement. *See* Resp. Opp., at p. 8.[1] Yet a split is readily apparent. The Petitioner's interpretation of 8 U.S.C. § 1252(d)(1) is consistent with the view of the Second Circuit and, increasingly, with the view of the Seventh Circuit. *See Zhong v. U.S. Department of Justice*, 480 F.3d 104 (2d Cir. 2007); *Isaaq v. Holder*, 617 F.3d 962 (7th Cir. 2010).

Third, the Government contends that certiorari should be denied because, assuming *arguendo* that

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[1] The Government appears to retreat from this position at page 17 of its Brief.

8 U.S.C. § 1252(d)(1) does not prescribe jurisdictional issue exhaustion, the Petitioner cannot advance his unexhausted particular social group argument in the face of the Government's timely objection. *See* Resp. Opp., at p. 17 (citing Gov't C.A. Brief, at pp. 8-13). This contention unduly hems the federal courts' authority to ascertain the character and applicability of any exceptions to a non-jurisdictional issue exhaustion rule.

Fourth, the Government asserts that "[t]his case would be a poor vehicle to consider the questions presented" because the Petitioner cannot prevail upon the merits. *See* Resp. Opp., at p. 19. Of course, the Petitioner disagrees that he cannot prevail. In any event, the strength of the Petitioner's substantive particular social group argument is not a matter about which this Court should concern itself – particularly since final resolution of the 8 U.S.C. § 1252(d)(1) jurisdictional controversy is a thing unrelated to the merits, and is of fundamental importance to the evolution of the national immigration law. *See* Pet. for Cert., at pp. 33-34 (citing numerous, recent dismissals for want of jurisdiction entered by the Ninth Circuit under 8 U.S.C. § 1252(d)(1)).[2]

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[2] The Petitioner respectfully submits that all other arguments raised by the Government, including the Government's attack upon the Petitioner's Fifth Amendment Due Process Claim, are satisfactorily addressed within the Petition for Certiorari.

ARGUMENT AND AUTHORITIES

1. The Government does not provide a compelling rationale for its view that 8 U.S.C. § 1252(d)(1) sets forth a jurisdictional issue exhaustion requirement. The Government insists that the plain meaning of 8 U.S.C. § 1252(d)(1) mandates jurisdictional issue exhaustion, but does not (it cannot) cite any statutory language which explicitly requires issue exhaustion.

Instead, the Government offers an overreaching analysis of 8 U.S.C. § 1252(d)(1).[3] The Government ambitiously alludes to a "statutory requirement that aliens exhaust issues before the Board," *see* Resp. Opp., at p. 8; and urges that "the plain text of the statute and the regulations . . . make clear that an alien must present to the Board any issue he seeks to present on petition for review to the court of appeals." *See id.*, at p. 11 (intra-textual reference omitted). Yet there is no immigration law – certainly, not 8 U.S.C. § 1252(d)(1) – which "make[s] clear" that immigrants must exhaust issues. *Cf. id.*[4] Moreover,

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[3] For the Government to succeed in its interpretation of 8 U.S.C. § 1252(d)(1), the Court must take two steps. First, the Court must hold that 8 U.S.C. § 1252(d)(1) impliedly commands issue exhaustion, *i.e.*, that the immigration issue exhaustion requirement is not judge-made. Second, the Court must hold that the implied requirement is jurisdictional.

[4] The Government evinces a misguided confidence about the plain meaning of the 8 U.S.C. § 1252(d)(1) remedy exhaustion requirement. *See* Resp. Opp., at pp. 8-12. For this Court has doubted that there is a "plain meaning" to a nearly identical remedy exhaustion requirement, contained within the Prison

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the immigration regulation cited by the Government, 8 C.F.R. § 1003.3(b),[5] does not (and cannot) alter the federal courts' subject matter jurisdiction.

1a. The absence of an explicit statutory issue exhaustion requirement – at 8 U.S.C. § 1252(d)(1), or anywhere else within the Immigration and Nationality Act, 8 U.S.C. §§ 1101 et seq. – is significant. In recent years, this Court repeatedly has refused to construe ambiguous statutory passages as erecting jurisdictional impediments to judicial review.[6] *See*

Litigation Reform Act, codified at 42 U.S.C. § 1997e(a). *See Booth v. Churner*, 532 U.S. 731, 737 (2001). The *Booth* Court expressed dissatisfaction with the parties' use of dictionary entries in order to define "available" "remedies." *See id.*, at 737-738; *id.*, at 737 ("Each of the parties also says that the plain meaning of the words 'remedies' and 'available' in the phrase 'such administrative remedies . . . available' is controlling. But as it turns out both of them quote some of the same dictionary definitions of 'available' 'remedies' and neither comes up with anything conclusive.").

[5] 8 C.F.R. § 1003.3(b) provides that, on appeal to the Board of Immigration Appeals, "The party taking the appeal must identify the reasons. . . ." The regulation also provides that, "The statement must specifically identify the findings of fact, the conclusions of law, or both, that are being challenged."

[6] Concededly, a statutory rule need not include "magic words" in order to be jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. ___, 131 S.Ct. 1197, 1203 (March 1, 2011). Many factors are apposite to a determination of a provision's jurisdictional character. Among them, "[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant." *Id.* (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___, 130 S.Ct. 1237, 1248 (2010)) (internal quotation marks omitted).

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Henderson ex rel. Henderson v. Shinseki, 562 U.S. ___, 131 S.Ct. 1197 (March 1, 2011) (the 38 U.S.C. § 7266(a) time period for filing a notice of appeal with the United States Court of Appeals for Veterans Claims is not jurisdictional); *Morrison v. National Australia Bank, Ltd.*, 130 S.Ct. 2869 (2010) (inquiry into the scope of the extraterritorial application of 15 U.S.C. § 78j(b) does not implicate subject matter jurisdiction); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. ___, 130 S.Ct. 1237 (2010) (the general requirement at 17 U.S.C. § 411(a) that, prior to filing a lawsuit for copyright infringement, an individual aggrieved have registered or have attempted to register his allegedly infringed copyright, is not jurisdictional); *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Division*, 558 U.S. ___, 130 S.Ct. 584 (2009) (the 29 C.F.R. § 301.2(b) requirement that, prior to submitting a labor dispute to arbitration before the National Railroad Adjustment Board, the parties have "conferenced" informally, is not jurisdictional); *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (the 42 U.S.C. § 2000e(b) employee numerosity requirement, a precondition to a finding of employer liability for sexual harassment under Title VII of the Civil Rights Act of 1964, is not jurisdictional); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)

Herein, the Government has not cited any Supreme Court case which interprets 8 U.S.C. § 1252(d)(1).

(the FED. R. CRIM. PRO. R. 33 time limit for filing a motion for a new trial is not jurisdictional); *Scarborough v. Principi*, 541 U.S. 401 (2004) (the 28 U.S.C. § 2412(d) time limit for moving for law fees and costs under the Equal Access to Justice Act is not jurisdictional); *Kontrick v. Ryan*, 540 U.S. 443 (2004) (the FED. R. BANK. PRO. R. 4004 time limit for filing an objection to the discharge of a debtor is not jurisdictional); *but see John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008) (the 28 U.S.C. § 2501 court of claims statute of limitations is jurisdictional); *Bowles v. Russell*, 551 U.S. 205 (2007) (the 28 U.S.C. § 2107 time limit for filing an appeal of a final judgment in a civil action is jurisdictional).

1b. Of equal significance, this Court recently has refused to recognize a (purportedly) regulatory limitation upon agency jurisdiction. In *Union Pacific*, *supra*, the Court rejected the petitioner railroad's argument that the parties' (alleged) non-compliance with a regulation, 29 C.F.R. § 301.2(b), ousted the jurisdiction of the National Railroad Adjustment Board over five worker grievances. *Union Pacific*, 130 S.Ct., at 597-598. (The National Railway Act, 45 U.S.C. §§ 451 et seq., requires informal conferencing between railroad industry and labor union representatives, prior to the submission of a labor grievance to the NRAB. 45 U.S.C. § 152 Second. In turn, 29 C.F.R. § 301.2(b) provides that no worker grievance "petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the [National Railway Act]."

Union Pacific, 130 S.Ct., at 597 (quoting 29 C.F.R. § 301.2(b)).)

Noting that the NRAB only possesses the authority to "adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section," 45 U.S.C. § 153 First (v), the *Union Pacific* Court held: "[b]ut that provision [29 C.F.R. § 301.2(b)], as other prescriptions in Circular One [29 C.F.R., Part 301], is a claims processing rule." *Union Pacific*, 130 S.Ct., at 597-598. The Court concluded, "Congress gave the Board no authority to adopt rules of jurisdictional dimension." *Id.*, at 597.

Like 45 U.S.C. § 153 First (v), the congressional grant to the Attorney General of immigration-related rule-making authority, 8 U.S.C. § 1103(g)(2), appears to lack any conferral of the power to promulgate jurisdictional regulations. 8 U.S.C. § 1103(g)(2) is similar to 45 U.S.C. § 153 First (v). 8 U.S.C. § 1103(g)(2) provides:

> The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section.

Id. Assertedly, if 45 U.S.C. § 153 First (v) is insufficiently explicit to effectuate a congressional delegation of authority to promulgate regulations which limit NRAB jurisdiction, *see Union Pacific*, 130 S.Ct., at 597, then 8 U.S.C. § 1103(g)(2) contains nothing which furnishes the Attorney General the authority to circumscribe federal judicial subject matter jurisdiction over immigration petitions for review. *But see Weinberger v. Salfi*, 422 U.S. 749, 766-767 (1975).

As such, the Government is mistaken to imply that 8 C.F.R. § 1003.3(b) imparts a jurisdictional issue exhaustion requirement. *Cf.* Resp. Opp., at p. 13. No immigration regulation limits the federal courts' subject matter jurisdiction. *Accord Kucana v. Holder*, 558 U.S. ___, 130 S.Ct. 827, 839-840 (2010).

1c. For all of the foregoing reasons, the Court should grant certiorari so as to confirm that 8 U.S.C. § 1252(d)(1) does not embody a jurisdictional issue exhaustion requirement.

2. The Government intimates that there is no circuit split about whether 8 U.S.C. § 1252(d)(1) directs jurisdictional issue exhaustion.[7] The Government is incorrect. There is a circuit split about whether 8 U.S.C. § 1252(d)(1) creates a jurisdictional issue exhaustion requirement.

The Government identifies no en banc opinion of the Second Circuit which overrules *Zhong v. U.S.*

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[7] *See* note 1, *supra*.

Department of Justice, 480 F.3d 104 (2d Cir. 2007). *See* Pet. for Cert., at p. 19 (discussing *Grullon v. Mukasey*, 509 F.3d 107 (2d Cir. 2007), *certiorari denied*, 129 S.Ct. 43 (2008)); *cf.* Resp. Opp., at p. 16 (stating that *Zhong* and *Grullon* "are not necessarily irreconcilable").

Furthermore, given this Court's instruction that lightly reasoned, "drive-by jurisdictional rulings" are not precedential, *see Arbaugh*, 546 U.S., at 511 (citation omitted), it now seems appropriate to place the Seventh Circuit firmly within the Second Circuit's camp. *See Isaaq v. Holder*, 617 F.3d 962, 968 (7th Cir. 2010). Presently, the Seventh Circuit treats 8 U.S.C. § 1252(d)(1) as being non-jurisdictional. *See id.*; *Flores-Castillo v. Holder*, 2011 WL 891799, at p. 3 (7th Cir., March 16, 2011) (not selected for publication).

Obviously, the Petitioner is not alone in his construction of 8 U.S.C. § 1252(d)(1).

3. The Government posits that, even if 8 U.S.C. § 1252(d)(1) does not command issue exhaustion, the distinction is semantic because the Government has preserved its objection to the Petitioner's unexhausted particular social group argument. *See* Resp. Opp., at pp. 15-18.

The Government overstates the legal significance of its objection. Prior to this Court's decision in *Russell*, the Ninth Circuit had alluded to the existence of "exceptions" (plural) to the immigration issue exhaustion requirement. *See Farhoud v. I.N.S.*, 122 F.3d 794, 796 (9th Cir. 1997) (emphasis added); *cf. Alcaraz v. I.N.S.*, 384 F.3d 1150, 1161 (9th Cir. 2004) ("We will

review an issue not raised in an appellant's opening brief if a failure to do so would result in manifest injustice. In addition, we may review an issue [not raised in briefs to this court] if the failure to raise the issue properly did not prejudice the defense of the opposing party.") (citations and internal quotation marks omitted). Presumably, only one of these several exceptions to a non-jurisdictional issue exhaustion doctrine would be susceptible to a Government objection.

What is more, contrary to the Government's pronouncement at page 17 of its Brief, the *Zhong* panel did not clearly hold that a mandatory issue exhaustion requirement is forgivable only if waived by the Government. Citing *Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90, 94 & n.4 (2d Cir. 1998), the *Zhong* Court stressed its "discretion" to "waive administrative exhaustion under certain circumstances." *Zhong*, 480 F.3d, at 123 (internal quotation marks omitted).

Bastek suggests that a judicial excuse of the exhaustion requirement is appropriate where – as here – persecution might befall a deported appellant:

> Such circumstances [warranting excuse] occur when . . . (5) "plaintiffs would suffer irreparable harm if required to exhaust their administrative remedies." *Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992).

Bastek, 145 F.3d, at 94 n.4;[8] *see also Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003) ("The requirement

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[8] In a sign of how messy the jurisdictional quandary can be (thus warranting this Court's continued attention, as well as its

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of administrative exhaustion can be either statutorily or judicially imposed. . . . statutory exhaustion requirements are mandatory, while the judicial (common-law) exhaustion doctrine is discretionary and includes a number of exceptions.") (citations omitted); *cf. Greenlaw v. United States*, 554 U.S. 237, 243-244 (2008) ("To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro v. United States*, 540 U.S. 375, 381-383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003).").

Thus, assuming that any immigration issue exhaustion requirement is judge-made, the requirement surely can be excused under a plethora of circumstances (for example, in cases of manifest injustice). If this Court holds that 8 U.S.C. § 1252(d)(1) does not embody a jurisdictional issue exhaustion requirement, the Court should confirm that the Ninth Circuit may excuse the failure to exhaust on remand. *See* Pet. for Cert., at pp. 34-35. At the very least, the Court should allow the Ninth Circuit to determine, in the first instance, the character and applicability of any and all (issue exhaustion) exceptions. *Accord Henderson*, 131 S.Ct., at 1306 ("We hold that the deadline for filing a notice of appeal with the Veterans

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intervention here), it is worth observing that the *Bastek* Court construed the exhaustion of remedies requirement at 7 U.S.C. § 6912(e) as statutorily mandating (non-waivable) issue exhaustion. *See Bastek v. Federal Crop Insurance Corp.*, 145 F.3d 90, 94-95 (2d Cir. 1998).

Court does not have jurisdictional attributes. The 120-day limit is nevertheless an important procedure rule. Whether this case falls within any exception to the rule is a question to be considered on remand.");[9] *Reed Elsevier*, 130 S.Ct., at 1249 (citations omitted).

4. Finally, the Government presses the inapposite contention that certiorari is unwarranted because the Petitioner cannot prevail upon the merits. *Cf.* Resp. Opp., at pp. 19-20. This is a misplaced distraction; the merits have nothing to do with 8 U.S.C. § 1252(d)(1). (Unlike the Eighth Circuit in *Etchu-Njang v. Gonzales*, 403 F.3d 577 (8th Cir. 2005), the Ninth Circuit did not make any alternative holding about the merits. *See* App. to Pet. for Cert., at pp. 1-2. Thus, the 8 U.S.C. § 1252(d)(1) jurisdictional controversy is squarely before this Court.)

All the same, the Petitioner can prevail on the merits, and he can overcome the Government's substantive attacks upon his particular social group argument. *Cf.* Pet. C.A. Brief, at pp. 13-24, *with* Resp. Opp., at pp. 19-20. His life may depend upon it. As the Immigration Judge stated:

> The Court regrets that the provisions of law which the Court must apply in this case do not offer adequate protection to the

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[9] The *Henderson* Court noted that the Government had not "disputed that the [Veterans Court notice of appeal filing] deadline is subject to equitable tolling if it is not jurisdictional." *Henderson*, 131 S.Ct., at 1306 n.4 (citation omitted).

> Respondent. The Court believes in fact that Respondent may undergo some danger if returned to Colombia.

Id., at p. 14; *cf. id.*, at p. 13 (" . . . the Court believes it reasonable to assume that if the guerrillas were to capture him [the Respondent] he would be dealt with the same as his step-father [who was murdered]").

PRAYER

Wherefore, premises considered, the Petitioner, Nilson Herney Valencia-Riascos, prays that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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March 22, 2011

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